Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 42104
Docket No. MW-42105
15-3-NRAB-00003-130041

The Third Division consisted of the regular members and in addition Referee Patrick Halter when award was rendered.

PARTIES TO DISPUTE: **(Brotherhood of Maintenance of Way Employes Division - IBT Rail Conference**
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Rick Franklin Contractors) to perform Maintenance of Way and Structures Department work (clean culverts and right of way ditches) between Mile Posts 301 and 306 on the Huntington Subdivision beginning on June 8, 2011 and continuing through August 3, 2011 (System File T-1152U-512/1559381).

(2) The Agreement was violated when the Carrier assigned outside forces (Rick Franklin Contractors) to perform Maintenance of Way and Structures Department work (install culverts and related duties) between Mile Posts 280.00 and 280.2 near LaGrande, Oregon beginning on July 12, 2011 and continuing through August 2, 2011 (System File T-1152U-518/1560470).

(3) The Agreement was violated when the Carrier assigned outside forces (Rick Franklin Contractors) to perform Maintenance of Way and Structures Department work (install culvert extensions and related duties) at Mile Post 302.30 near LaGrande, Oregon on August 3 and 4, 2011 (System File T-1152U-519/1560471).

(4) The Agreement was further violated when the Carrier failed to furnish the General Chairman with an advance notice of its

intent to contract out the aforesaid work and failed to make a good-faith effort to reduce the incidence of contracting out scope covered work and increase the use of its Maintenance of Way forces as required by Rule 52 and the December 11, 1981 National Letter of Agreement.

(5) As a consequence of the violations referred to in Parts (1) and/or (4) above, Claimants J. Decker, J. Chandler, D. Hamilton and C. Fletcher shall now each be compensated for three hundred and fifty (350) hours at their respective straight time rates of pay and for forty (40) hours at their respective overtime rates of pay.

(6) As a consequence of the violations referred to in Parts (2) and/or (4) above, Claimants J. Decker, J. Chandler, D. Hamilton and C. Fletcher shall now each be compensated for one hundred thirty (130) hours at their respective straight time rates of pay and for thirty (30) hours at their respective overtime rates of pay.

(7) As a consequence of the violations referred to in Parts (3) and/or (4) above, Claimants J. Decker, J. Chandler and C. Fletcher shall now each be compensated for twenty (20) hours at their respective straight time rates of pay."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Organization filed three claims (collectively referred to as the claim) involving a contractor and its forces performing maintenance-of-way work. The claim is properly before the Board following timely on-property processing (filings and responses thereto) and conferences.

The first claim, dated August 4, 2011, involves four contractor forces operating two excavators, two front end loaders and one dozer. The second claim, dated August 30, 2011, involves four contractor forces operating one excavator, one front end loader and one dozer. The third claim, also dated August 30, 2011, involves three contractor forces operating one excavator and one front end loader. The claims are collectively considered in this decision.

According to the Organization, the Carrier assigned outside forces to perform maintenance work and right-of-way cleaning on the Huntington Subdivision during certain dates in June, July and August 2011 between MP 280 and MP 306. The Organization states that the work is reserved to BMWE-represented employees pursuant to Rules 1, 2, 4, 5 and 9 as recognized in Third Division Awards 14061 and 29916 (among others) and recognized in Carrier writings. Also, the Carrier never denied that its employees customarily perform this type of work. The Claimants were ready, willing and able to perform the claimed work.

Aside from assigning work reserved to BMWE-represented employees to an outside force, the Carrier failed to comply with the advance notice and conference provisions set forth in Rule 52 and the December 11, 1981 Berge-Hopkins Letter of Understanding (LOU). Rule 52 and the LOU require notice and reasons for each contracting transaction and a conference convened in good faith as confirmed in on-property Third Divisions Awards 29121, 40964 and 41107 to name a few. The Carrier's violation of Rule 52 and the LOU show that it failed to exert a good-faith effort to reduce the incidence of contracting as a means to increase the use of BMWE-represented employees.

The Carrier's defenses are without merit. The affirmative defense of an "emergency" is not proven by the Carrier. There was no service interruption in whole or in part and traffic continued (albeit at reduced speed) at all times through the area without interruption. Reduced train speed is not an emergency. Work by

outside forces did not commence for nearly two weeks after the right-of-way damage occurred and prior to the arrival of outside forces. During that two week period, BMWE-represented employees could have been assigned. This two-week delay is a tacit admission that an emergency did not exist.

Emergency is a pretext for the contract that contains minimum work thresholds requiring the Carrier to use outside forces. Outside forces worked for months which is another indicia that the Carrier was fulfilling a contract obligation unrelated to the alleged emergency. A negative inference must be drawn from the Carrier's refusal to disclose the contract. As for the Track Supervisor's email relied upon by the Carrier, the Organization states that it interviewed the Track Supervisor and he never declared an emergency and never stated that the Claimants declined or refused work for any reason. The Claimants' statements show that the work was not offered to them and they did not refuse any work for safety reasons.

The Claimants suffered a loss of work opportunity; the Carrier's "fully employed" argument is not a basis for denying monetary relief. Such relief preserves the integrity of the Collective Bargaining Agreement as noted in on-property Third Division Awards 29577, 36516 and 36964 to name a few. The Carrier's argument that the requested relief is excessive must be assessed in the absence of any proof, such as payroll records and work history documents in the Carrier's possession, showing that the claimed hours are inaccurate. The claimed hours must be considered accurate in the context of this record. The Organization observes that the Board could remand the claim to the parties to determine the number of contractor hours expended as occurred in Third Division Award 37376.

According to the Carrier, emergency conditions existed which affords the Carrier flexibility and latitude to use outside forces, alone, or in combination with its own employees. In this regard, Rule 52 states that a notice and conference are not required when using "contractors . . . in the performance of work in emergencies such as . . . washouts . . . landslides[.]" Third Division Award 32097, involving a derailment, supports the Carrier as it states ". . . the Carrier had no contractual obligation [under Rule 52(c)] to utilize its own forces to repair the damage." Likewise, Third Division Award 31676 states that during an emergency the Carrier ". . . may take whatever action it deems appropriate to cope with its problems; see Third Division Awards 13316, 12777, 15597 and similar holdings."

Third Division Award 20527 defines "emergency" as "an unforeseen combination of circumstances which calls for immediate action." The heavy rain in May and June 2011 saturated more than a 20 mile area and caused a mud slide moving six to 12 inches every 24 hours. The Track Supervisor's email states "the track was sinking causing a profile defect" which affected operations with the rerouting of all trains around this area because of the conditions that existed from May through August.

The mudslide created the emergency; the Carrier was not required to issue advance notice of its intention to contract out the work in question because it would be impractical and not responsive to the emergency. The Carrier states that ". . . numerous Board Awards [such as 29965 and 29999] clearly show that a landslide or any other similar type disaster constitutes an emergency" and "[e]mergency work simply cannot wait for conferences or attempts to reach understandings." Under the principle of stare decisis this matter has been resolved and requires no further examination by the Board. Aside from notice and conference not being required, the LOU is not applicable because it created no obligations on the part of the Carrier beyond or separate from those contained in Rule 52.

In addition to the emergency, there is an irreconcilable dispute of facts which justifies denying the claim. The Organization bears the burden of proof to present sufficient facts to establish its claim. The facts in this case show that the outside forces worked along with BMWE-represented employees. For example, the Claimant Hamilton operated an excavator to clean a culvert and Claimant Chandler operated a hi-rail vehicle to clean ditches and culverts. When there is a factual dispute about the work performed and equipment used which are central to the claim, Third Division Awards 30591, 33951 and 37204 held that the claim must be denied because the Board has no way to assess and resolve the validity of competing versions.

Aside from failing to establish any Rules violations, the Carrier states that the claim is excessive. Representative of the excessive nature of the claim is the Carrier's request to Claimants Chandler, Hamilton and Fletcher to install French drains at the mudslide; they "refused" because "the hill side was too steep and unsafe." On several occasions the Carrier requested Claimant Decker to relieve a

Foreman for weekend duty and operate equipment, but Claimant Decker declined due to childcare responsibilities.

This is an appellate proceeding wherein the Board does not conduct a de novo review of the record. The contract language contained within Rule 52 and relied upon by the Carrier is as follows:

> **"Nothing contained in this rule requires that notices be given, conferences be held or agreement reached with the General Chairman regarding the use of contractors or use of other than Maintenance of Way employees in the performance of work in emergencies such as wrecks, washouts, fires, earthquakes, landslides and similar disasters."**

The Carrier established that Rule 52 applies because there were "washouts" and "landslides" (mudslides) caused by the intense rains saturating the ground. The Organization does not dispute that there were washouts and mudslides caused by the rains or that the rains were anything but unforeseen circumstances. Rather, the Organization states that the work involved – clearing right-of-way and culverts including installation and extensions – is customarily performed by BMWE-represented employees. The Board finds that this work is customarily performed by BMWE-represented employees; however, the Parties agreed in Rule 52 to encompass within the definition of "emergencies" such items as "washouts" and "landslides" and, when those exist as in the instant claim, Rule 52 does not require ". . . that notices be given, conferences be held or agreement reached with the General Chairman regarding the use of contractors or use of other than Maintenance of Way employees . . . ."

Given the plain contract language in Rule 52 applied to the findings about washouts and landslides, the instant claim must be denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 13th day of July 2015.